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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAN MANZO REYES BARAJAS,

Defendant and Appellant.

A105946

(Mendocino County
Super. Ct. No. CR035726602)

Defendant pleaded guilty to a violation of Penal Code section 288, subdivision (a)¹, lewd act on a child under the age of 14 years. The court denied probation and sentenced defendant to the midterm of six years. The court also ordered the defendant to undergo involuntary AIDS testing pursuant to section 1202.1, subdivision (a). Defendant filed a timely notice of appeal and contends that there was insufficient evidence to impose AIDS testing. We agree. The order for testing is ordered stricken and the case is remanded for a hearing to determine whether there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV was transferred from the defendant to the victim (§ 1202.1, subd. (e)(6)(A)(iii)).

¹ All statutory references are to the Penal Code.

Discussion

The mother of five-year-old Juan B. found her son in bed with the defendant, the adult uncle of Juan B. When the mother entered the room, Juan B. got out of bed and pulled up his pants. Defendant was fully clothed. Later at home Juan B. told his mother that defendant touched his penis and testicles. Defendant admitted to a Mendocino County deputy sheriff that he pulled down Juan B's pants and touched his penis for about a minute. He said he stopped when the mother entered the room.

Involuntary HIV testing is strictly limited by statute. The record before us does not support compliance with section 1202.1, subdivision (e)(6)(A)(iii). When a defendant fails to object to testing, as in this case, the remedy is to strike the order and remand the matter to the trial court for a further hearing (*People v. Butler* (2003) 31 Cal.4th 1119). It is so ordered.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.